UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD **REGION SEVEN**

PECKHAM VOCATIONAL INDUSTRIES, INC.,

Honorable Eric M. Fine

Respondent,

and

Case No. 07-CA-081429

UNITED PECKHAM EMPLOYEE ASSOCIATION,

Charging Party.

David J. Houston (P30448) Christina K. McDonald (P73517) DICKINSON WRIGHT PLLC

Attorneys for Respondent Peckham Vocational Industries, Inc. 215 South Washington Square, #200 Lansing, MI 48933

(517) 487-4777

Russell G. Webb (P58517) Peckham Vocational Industries, Inc. Co-counsel for Respondent Peckham Vocational Industries, Inc. 3510 Capital City Boulevard Lansing, MI 48906 (517) 316-4111

Ingrid L. Kock (P59250) National Labor Relations Board Counsel for the Acting General Counsel 477 Michigan Avenue, Room 300 Detroit, MI 48226-2569 (313) 226-3233

> BRIEF IN SUPPORT OF PECKHAM VOCATIONAL INDUSTRIES, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT (BULLETIN BOARDS)

I. INTRODUCTION

The facts with respect to the allegations raised in paragraphs 11, 12, and 13 of the Charging Party's Complaint regarding Respondent Peckham Vocational Industries, Inc.'s ("Peckham") bulletin boards do not present a violation of the National Labor Relations Act ("Act") as a matter of law, and the alleged violations in paragraphs 11, 12 and 13 should therefore be dismissed.

Peckham has a solicitation policy that strictly prohibits any postings on its bulletin board that are unrelated to Company information and notices. Peckham's solicitation policy addresses and permissibly prohibits general bulletin board postings. Peckham has long required that any postings on its bulletin board be approved in advance by designated Peckham management personnel. Peckham's solicitation policy has been strictly and uniformly enforced for years, and the solicitation policy, and Peckham's enforcement thereof, pre-dates the Respondent's knowledge of any organizing or other protected activity of the Charging Party or its predecessor.

Under established precedent of the National Labor Relations Board ("Board"), Peckham's solicitation policy is valid and Peckham's enforcement of the Policy does not violate the Act. Therefore, summary judgment should be granted in favor of Peckham with respect to the Charging Party's allegations related to Peckham's restrictions on use of its instrumentality, its bulletin boards.

II. FACTUAL BACKGROUND

Peckham is a 501(c)(3) nonprofit rehabilitation agency serving persons who are significantly vocationally disadvantaged. (Declaration of Jo Sinha, attached hereto as <u>Exhibit 1</u>, at ¶2). Peckham maintains two large bulletin boards on the walls of its Lansing facility near the main client and staff entrance. (Exhibit 1, ¶5). Since at least August 2010, Peckham has maintained, without modification, a policy entitled "SOLICITATION" (referred to hereinafter as

the "Policy") regarding solicitations and bulletin boards in the workplace. (Exhibit 1, ¶¶4, 5). The Policy states, as relevant with respect to Peckham's bulletin boards, as follows:

(6) The Company maintains bulletin boards and electronic communication to communicate Company information to employees and to post notices required by law. These bulletin boards or communications are for the posting of Company information and notices only, and only persons designated by the Administration may place notices on or take down material from the bulletin boards.

[See Exhibit 1, ¶4 and Policy attached thereto as Exhibit A.]

Peckham has consistently enforced the Policy since its inception. (Exhibit 1, ¶5). As indicated in the above-quoted Policy language, Peckham does not permit employees to utilize the bulletin boards because they are for the "posting of Company information and notices only." Further, any and all bulletin board postings require prior approval by an authorized member of Peckham's management. (Exhibit 1, ¶¶4,5). In other words, postings on the bulletin boards is restricted.

Under section 6 of the Policy, quoted above, Peckham has, on rare occasion, permitted the posting of "thank-you" notes directed to Peckham's employees from Peckham's clients where, for example, a client suffered the death of a family member and a Peckham employee expressed condolences or provided support with a meal or other gesture of sympathy. (Exhibit 1, ¶6). Such messages further Peckham's mission and business purpose because Peckham's primary mission is to rehabilitate and support its clients. (*Id*).

Peckham has also permitted, on occasion, the posting of announcements of community resource services or events that in the professional judgment of Peckham professional staff, directly benefit and enhance Peckham's clients' rehabilitation, such as Social Security Administration information, clothing or food pantry information, and classes or programs for continuing education. (Exhibit 1, ¶7). In each of these cases, Peckham's professional

Vocational Support Specialists ("VSS"), its case managers, and rehabilitative and other counselors have adjudged that Peckham's clients, to whom such postings are directed, would receive and experience therapeutic, recreational, or other benefits that directly advance and support Peckham's business purpose and mission to rehabilitate and serve its vocationally-disadvantaged clients. (*Id.* at ¶6, 7).

Since at least August 2010, Peckham has never posted on its bulletin boards or allowed any person or entity to post on its bulletin boards any document, material, information, solicitation or other posting relating to *any* protected activity, or for that matter, any outside organization or group, except as specifically set forth above. (Exhibit 1, ¶8, *see*, ¶¶6, 7). Peckham has never posted or allowed postings related to any pro or anti-union activity nor has it allowed any other solicitations or information unrelated to Company information or notices to be posted on its bulletin boards. (*Id*, ¶8). As discussed below, Peckham's actions and its Policy have been, at all times relevant, permissible under the Act.

III. THE ALLEGATIONS CONCERNING PECKHAM'S BULLETIN BOARDS SHOULD BE DISMISSED

The Complaint alleges that Peckham enforced its Policy "selectively and disparately by removing and prohibiting bulletin board postings in support of the Charging Party while permitting nonunion bulletin board postings." (Complaint, ¶12(a)). The Complaint alleges that Peckham enforced its Policy "to discourage its employees from forming, joining, and assisting the Charging Party or engaging in other concerted activities." (Complaint, ¶12(b)). Further, the Charging Party alleges that Peckham "announced a change in the [Policy] by requiring employees to obtain management permission to post bulletin board items" . . . "in order to

discourage its employees from forming, joining, and assisting the Charging Party or engaging in other concerted activities." (Complaint, ¶13(a), (b)).

Paragraph 12 of the Complaint fails as a matter of law because Peckham applies its valid, nondiscriminatory Policy equally to all postings. The Charging Party cannot and has not established any facts demonstrating that Peckham disparately removed or prohibited bulletin board postings. Paragraph 13 of the Complaint fails as a matter of law because the allegations stated therein are false. Peckham never announced a change in the Policy and has at all times required that all postings be pre-approved by authorized members of management. The Charging Party will not be able to establish that Peckham is motivated by antiunion animus because Peckham's Policy, and its enforcement thereof, pre-existed the allegations raised in the Charging Party's Complaint.

For all of the reasons set forth in this Brief, judgment must be granted in favor of Peckham as to Allegations 11, 12, and 13 of the Complaint.

A. Peckham's Policy is Facially Valid

The Charging Party has not alleged that the Policy is facially invalid in any respect. (*See* Complaint, ¶11). Peckham notes, as a matter of record, that the Board has consistently upheld solicitation policies like Peckham's Policy. *See, e.g., The Guard Publishing Co. d/b/a Register Guard*, 351 NLRB No. 70 (2007); *Loparex LLC v. NLRB*, 591 F.3d 540 (7th Cir. 2009). There is no dispute that Peckham's Policy is valid and nondiscriminatory on its face.

B. Peckham's Policy is Valid as Applied

The Guard Publishing Co. d/b/a The Register Guard, 351 NLRB No. 70 (2007)(hereinafter "Register Guard") governs this case and clearly holds that a policy prohibiting employee use of a communications system for "non-job-related solicitations" does not violate the Act. Employees have no statutory right to use Peckham's bulletin board for

Section 7 matters. *Register Guard* at 5 ("an employer has a basic property right to regulate and restrict employee use of company property")(internal citation omitted); see also *Eaton Techs.*, 322 NLRB 848, 853 (1997)("It is well established that there is no statutory right of employees to use an employer's bulletin board"). An employer has every right to bar employees' nonwork-related use of communication systems, "unless the employer acts in a manner that discriminates against Section 7 activity." *Register Guard* at 7. "Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id.* at 9.

Register Guard involved the use of the employer's e-mail system to convey union-related messages. In Register Guard, the employer had an established policy that provided that "communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Id. at 2. The employer knew that employees used the e-mail system to send and receive personal messages such as jokes, baby announcements, party invitations, and offers for sports tickets or requests for services such as dog walking. Id. The employer also permitted employees (or anyone else) to use the e-mail system to solicit support for or participation in an annual charitable campaign supported by the employer, in this case United Way. Id. at 8. The employer prohibited e-mails or solicitations concerning any other outside cause or organization. Id. at 2. At some point after the employer's policy was adopted, employees used the e-mail system to send pro-union messages, including asking employees to wear green to support the union and asking employees to participate in the union's parade. The Board held that such e-mails violated the employer's permissible prohibition on communications and solicitations.

The facts in *Register Guard* are similar to those in the present case. Both policies strictly prohibit non-job solicitations and communications. Peckham's bulletin boards, like *Register Guard's* e-mail system, are strictly used for Company-related purposes and information. On occasion, a thank-you note, like the party invitations and personal messages in *Register Guard*, are posted on the bulletin board. In addition, on occasion, a community event unrelated to any particular organization, like the charitable campaign in *Register Guard*, is posted on Peckham's bulletin board in furtherance of the Company's mission to rehabilitate Peckham clients. The principles announced in *Register Guard* are directly on point and govern the analysis in this case.

Register Guard made clear that "nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis." The Board explained:

[A]n employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g. car for sale) and solicitations of the commercial sale of a product (e.g. Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.

Id. at 9.

Peckham's Policy clearly and on its face distinguishes between Peckham business-related and non-business related communications. No distinction or discrimination along Section 7 lines is present. The Policy prohibits *all* non-work related communications (i.e. "posting of Company information and notices only"). If Peckham took down any union notices, it did so permissibly under Board law.

The General Counsel may argue that the thank you notes or community-event posters on Peckham's bulletin boards are non-work related. This argument fails because Peckham's mission is to rehabilitate vocationally-disadvantaged individuals. Thank you notes and

community information serve that mission and are unquestionably included within "Company information."

Even if they were not, such postings would still be permissible because neither category of posting is of a "similar character" to the union solicitations at issue in the Complaint. *Register Guard* makes it clear that unlawful discrimination must be along Section 7 lines and must be between postings of a similar character. Neither the thank you notes nor the community event information postings are akin to a solicitation to join a group, including but not limited to a union.

Another case that is analogous to the present issue is *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995). *Guardian Industries* rejected the Board contention that whenever an employer permits employees the slightest access to a bulletin board, it must permit the posting of union notices, and anything else is forbidden discrimination. The charging party in the case alleged that because the employer posted 3x5 cards on its bulletin board on the employee's behalf that announced items for sale, such as used cars, the union was entitled to post notices concerning protected organizing activities. The employer in *Guardian Industries* also at times allowed wedding announcements and announcements for fundraising events for employees stricken by illness to be posted. The court held that such postings did not give rise to a right of employees to post union meeting notices, stating that the "right of labor organization does not imply that the employer must promote unions by given them special access to bulletin boards." *Id.* The court could not see how a union meeting notice was in any way akin to an index card offering a fellow employee the opportunity to buy a "newly born puppy."

The court held that a "rule distinguishing pro-union organization from anti-union organization would be disparate treatment. A rule banning all organizational notices (those of

the Red Cross along with meetings pro and con unions) is impossible to understand as disparate treatment of unions."

As with the present case, it is not discriminatory to allow postings for thank you notes and community events. Peckham does not permit pro- or anti-union notices to be posted just as it does not permit any non-Company related notice to be posted. Peckham's allowance of a very few postings, all of which are specifically related to its Company rehabilitative and vocational mission, are even less of a variance from its Policy than the for-sale notices in *Guardian Industries*. Consequently, Peckham's prohibition of union postings is not in any way unlawfully discriminatory.

Further, the law creates an explicit exception for postings like the thank you notes and community events posters that Peckham occasionally permits on its bulletin boards. The United States Supreme Court has held that the fact that an institution allows some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use its facilities does not transform that institution into a public forum such that unions are entitled to use it. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983)("the constitutional right of access would in any event extend only to other entities of similar character," and would not extend to organizations such as unions). *Id.*

Like the Supreme Court, the Board has recognized the importance of creating exceptions for charitable or beneficent postings and messages. In *Hammary Manufacturing Corp.*, 265 NLRB No. 57 (1982), the Board held that:

[A]n employer does not violate Section 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule. . . . Thus, rather than finding an exception for charities to be a *per se* violation of the Act, the Board has evaluated the quantum of incidents involved to determine whether unlawful discrimination has occurred.

Applying this rule, the Board held that a no solicitation rule that permitted United Way solicitations was permissible. Although the community event postings that Peckham allows on its bulletin board further the Company's purpose, they would nevertheless be protected under *Hammary* because each posting, which occurs very rarely, qualifies as a "small number of isolated 'beneficent acts,'" which are clearly permissible.

In short, Peckham does not discriminate along Section 7 lines. All of its postings are Company related or, at the very least, are limited and isolated postings of beneficent acts, which are permissible under established Board precedent. The Charging Party's claims in this regard fail as a matter of law.

C. Peckham's Pre-Existing Policy Is Not the Product of Improper Motivations

The Charging Party's Complaint alleges that on about May 15, 2012, Peckham removed and prohibited employee bulletin board postings "in order to discourage its employees from forming, joining, and assisting the Charging Party or engaging in other concerted activities." (Complaint, ¶12(a), (b)). Further, the Complaint alleges that Peckham changed its Policy by requiring employees to obtain approval before posting items (Complaint, ¶13(a), (b)). Essentially, the Charging Party alleges that Peckham's actions with respect to the bulletin boards were motivated by antiunion animus. Such allegations are patently and undisputedly false because Peckham's valid policy has existed since at least August 2010, which pre-exists the allegations concerning activities on or about May 15, 2012.

First, Peckham did not make any announcement changing its Policy nor has it changed its Policy at any time since August 2010, including on or after May 15, 2012. (Exhibit 1, ¶5). In fact, Peckham was not aware of any organizing activities by United Peckham Employees Association, or its predecessor, until approximately February 1, 2012. (Exhibit 1, ¶3). The

Policy quoted above and attached as Exhibit 2 has existed at all times since August 2010. At all times since at least August 2010, management approval has been required before any notices or postings can be placed on Peckham's bulletin boards. (Exhibit 2, "only persons designated by the Administration may place notices on or take down material from the bulletin boards"). The Charging Party has not shown and cannot show any facts to the contrary. Because the Policy has not changed as alleged, the allegations in paragraph 13(a) and (b) of the Complaint must be dismissed.

Second, Peckham has never removed any postings for the improper purpose of discouraging union or other protected, concerted activity. In order to prevail on this allegation, the Charging Party must establish that Peckham had an "antiunion animus" that was a "substantial or motivating factor" in its decision to remove or prohibit bulletin board postings. *Loparex LLC v. NLRB*, 591 F.3d 540 (7th Cir. 2009)(applying the framework set forth in *Board in Wright Line*, 251 NLRB No. 1083 (1980)). It cannot do so because the Policy was enacted in August 2010, far before the alleged activities took place on or about May 15, 2012. The enactment and enforcement of the Policy had absolutely nothing to do with union activity.

In *Loparex*, the court found that the Board had established that the employer's posting policy was motivated by antiunion animus because the policy was not enacted until *after* the union put up multiple union flyers on the employer's bulletin board and *after* a three or fourmonth period during which the employer witnessed an uptick in employees' organizing efforts. *Id.* at 546. No antiunion animus is present here whatsoever – the Policy was enacted at least two years before the alleged activity.

The Charging Party will be unable to establish any facts that demonstrate that a "substantial or motivating" factor behind the Policy was antiunion animus because the Policy

pre-existed the activities described in the allegations. Therefore, judgment should be granted in Peckham's favor as a matter of law on paragraphs 12 and 13 of the Complaint.

IV. <u>CONCLUSION</u>

For all of the foregoing reasons, Peckham's Motion for Partial Summary Judgment on all charges related to Peckham's bulletin boards, specifically allegations 11, 12, and 13 of the Complaint, should be granted.

Respectfully submitted,

DICKINSON WRIGHT PLLC

Dated: August 23, 2012

David J. Houston (P30448)

Christina K. McDonald (P73517)

Attorneys for Respondent Peckham

Vocational Industries, Inc.

215 S. Washington Square, Suite 200

Lansing, MI 48933-1816

(517) 487-4777

By:

Russell G. Webb (P58517)

Co-Counsel for Respondent Peckham

Vocational Industries, Inc.

3510 Capital City Boulevard

Lansing, MI 48906

(517) 316-4111

EXHIBIT 1

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION SEVEN

PECKHAM VOCATIONAL INDUSTRIES, INC.,

Administrative Law Judge

Eric M. Fine

Respondent,

and

Case No. 07-CA-081429

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David J. Houston (P30448)
Christina K. McDonald (P73517)
DICKINSON WRIGHT PLLC
Attorneys for Respondent Peckham Vocational Industries, Inc.
215 South Washington Square, #200
Lansing, MI 48933
(517) 487-4777

Russell G. Webb (P58517)
Peckham Vocational Industries, Inc.
Co-counsel for Respondent Peckham Vocational Industries, Inc.
3510 Capital City Boulevard
Lansing, MI 48906
(517) 316-4111

Ingrid L. Kock (P59250) National Labor Relations Board Counsel for the Acting General Counsel 477 Michigan Avenue, Room 300 Detroit, MI 48226-2569 (313) 226-3233

DECLARATION OF JO SINHA IN SUPPORT OF RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT (BULLETIN BOARDS)

I, Jo Sinha, hereby declare and state as follows:

- 1. I have personal knowledge of the facts set forth herein, and I am competent to testify thereto as a witness.
- 2. I am employed by Respondent Peckham Vocational Industries, Inc. ("Peckham"), as its Corporate Vice President, and I have been so employed at all times relevant. Peckham is a 501(c)(3) nonprofit rehabilitation agency serving persons who are significantly vocationally disadvantaged.
- 3. Peckham first became aware of the organizing activities of the United Peckham Employees Association, or its predecessor, on or within a day of February 1, 2012.
- 4. Peckham has maintained without modification the following policy, entitled, "SOLICITATION," since at least August of 2010 to the present:
 - (6) The Company maintains bulletin boards and electronic communication to communicate Company information to employees and to post notices required by law. These bulletin boards or communications are for the posting of Company information and notices only, and only persons designated by the Administration may place notices on or take down material from the bulletin boards.

A full copy of the SOLICITATION policy is attached hereto as Exhibit A.

- 5. Peckham has two large bulletin boards on the walls of its Lansing facility close to where clients and staff enter the building. Since at least August of 2010, it has been the consistently-enforced policy of Peckham that all bulletin board postings required prior approval by persons designated by Peckham's senior management. This policy has not been modified since at least August of 2010 to the present.
- 6. Under Section (6) of Peckham's written SOLICITATION policy, Peckham has rarely, but occasionally, permitted posting of client "thank you" notes directed to other employees where, for example, the client had suffered the death of a family member and other Peckham clients expressed condolences or provided support

to that client, for example, contributions of meals due to the circumstance. In these instances it is

the professional judgment of Peckham professional Vocational Support Specialist ("VSS"), case

managers, rehabilitative and other counselors, that such postings advance Peckham's primarily

rehabilitative role and mission, and the rehabilitation of the involved client or clients.

Under Section (6) of Peckham's written SOLICITATION policy, Peckham has 7.

occasionally permitted posting of announcements of community resource services or events from

which attendance by Peckham clients, in the professional judgment of Peckham professional

VSS workers, case managers, rehabilitative and other counselors, would experience therapeutic,

recreational, or other benefits that would contribute to the well-being and rehabilitation of those

Peckham clients, and thereby advance Peckham's primarily rehabilitative role and mission.

At no time since at least August or 2010, has Peckham ever posted on its bulletin 8.

boards, or allowed to be posted on its bulletin boards by any other person or entity, any

document, material or posting, relating to support for or objection to any union or protected

collective activity under the National Labor Relations Act. Such document, material or posting

would violate the Peckham SOLICITATION policy section (6) which prohibits posting of items

which would not involve "the posting of Company information and notices only."

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing 9.

is true and correct.

Further Declarant sayeth naught.

Dated: August 23, 2012

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Sinha Sinha

EXHIBIT A

Peckham SOLICITATION - 604 Policy

It is the policy of Peckham (the Company) to prohibit solicitation and distribution on its premises by nonemployees and to permit solicitation and distribution by employees only as outlined below.

Comment

- (1) The Company limits solicitation and distribution on its premises because, when left unrestricted, such activities can interfere with the normal operations of the organization, can be detrimental to employee efficiency, can be annoying to customers, and can pose a threat to security.
- (2) The Administration is responsible for administering this policy and for enforcing its provisions. Employees will be subject to disciplinary action for violations of this policy. (See Behavior of Employees, 801.)
- (3) Persons who are not employed by the Company are prohibited from soliciting funds or signatures, conducting membership drives, distributing literature or gifts, offering to sell merchandise or services (except by representatives of suppliers properly identified to the Administration), or engaging in any other solicitation or similar activity on Company premises.
- (4) The Administration may authorize a few fund drives by employees on behalf of charitable organizations or for employee gifts. Employees are encouraged to volunteer to assist in these drives. However, employees are not to be discriminated against because of their willingness or unwillingness to participate. (For policy on political solicitations, see Participation in Community Affairs, 902.)
- (5) Employees are permitted to engage in solicitation or distribution of literature for any group or organization, including charitable organizations, only in accordance with the following restrictions:
 - (a) The sale of merchandise is prohibited on Company premises.
 - (b) Solicitation and distribution of literature are prohibited during the working time of either the employee making the solicitation or distribution, or the targeted employee. The term "working time" does not include an employee's authorized lunch or rest periods or other time when the employee is not required to be working.

- (c) Distribution of literature is prohibited in work areas at all time
- (d) The electronic distribution of solicitation literature that is not sanctioned by Peckham as a business commodity.
- (e) The distribution of literature in such a manner as to cause litter on Company property is prohibited.
- (f) Off-duty employees are not allowed to return to the Company premises until their next scheduled work time except as a customer of the Company.
- (6) The Company maintains bulletin boards and electronic communication to communicate Company information to employees and to post notices required by law. These bulletin boards or communications are for the posting of Company information and notices only, and only persons designated by the Administration may place notices on or take down material from the bulletin boards.

Reviewed/Revised 8/10